Petition

81-649

No.

Office - Supreme Court, U.S.
FILED
OCT 2 1981
STEVAS,
CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1981

PEGGY COLLINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals,
Eighth Circuit

DAVID C. GODFREY, MBE 15389
130 S. Bemiston, Suite 502
Clayton, Missouri 63105
(314) 721-3383
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the court of appeals failed to protect petitioner's Fourth Amendment right to be secure in her home when sanctioning the warrantless entry by government agents into her home for the purpose of arresting her and another party, and seizing drugs they expected to be there, which ruling is in conflict with this Court's rulings in *Payton* v. *New York* and *Coolidge* v. *New Hampshire*.

2. Whether petitioner's right to due process, and her Sixth Amendment right to be informed of the nature of the accusation, were violated by the placing of false information on the face of the indictment which misled her when preparing her defense by causing her to believe she was charged with the more serious crimes involving narcotic, rather than non-narcotic, drugs.

3. Whether petitioner's rights to due process and a fair trial were violated when the court of appeals sanctioned the trial court's allowance of hearsay testimony by police officers before making a finding that a conspiracy existed and petitioner was a member of it, and that the statements were made in furtherance of such conspiracy.

4. Whether the decision of the court of appeals with regard to petitioner's in-custody statement to government witnesses Schlueter is in conflict with this Court's decision in *U.S.* v. *Henry*.

5. Whether petitioner's right to due process and a fair trial was violated when the court of appeals sanctioned the failure of the trial court to instruct the jury on the lesser included offense of simple possession.

6. Whether petitioner's substantial right to a fair trial was affected when the trial court charged the jury to make a finding of her innocence.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	1
Jurisdictional Statement	2
Statutes and Rules Involved	2
Statement of the Case	5
Reasons for Granting the Writ:	
I. Search and Seizure	8
II. Misleading Indictment	12
III. Hearsay Testimony	14
IV. In-Custody Statement	17
V. Lesser Included Offense	18
VI. Instruction to Find Innocence	21
Conclusion	22
Appendix A — June 23, 1981 Order Affirming Judgment	A-1
Appendix B — August 5, 1981 Order Denying Rehearing	A-2
Appendix C — Face sheet of Indictment	A-3

TABLE OF AUTHORITIES CITED

Cases:

Calderon v. The Waco Lighthouse for the Blind, 630 F. 2d 352 (5th Cir. 1980) 10

Cleaver v. United States, 238 F.2d 766 16

Coolidge v. Schooner California, 637 F.2d 1321 (9th Cir. 1981) 11

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 11

Hill v. Duriron Co., Inc. (C.A.6), No. 79-3635, Aug. 12, 1981 10

Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973) 20,21

Lewis v. United States, 385 U.S. 206 (1966) 9

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 8

United States v. Brischetto, 538 F.2d 208 (8th Cir. 1976) 20

United States v. Brozyna, 571 F.2d 742 (2nd Cir. 1978) . 12

United States v. Burns, 624 F.2d 95, 104 (10th Cir. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 361, 66 L.Ed.2d 219 19,20

United States v. Collins, 552 F.2d 243 (8th Cir. 1977) ... 16

United States v. Dubrofsky, 581 F.2d 108 (9th Cir. 1978) 10

United States v. Elsoffer, 644 F.2d 357 (5th Cir. 1981) .. 10

United States v. Gresko, 632 F.2d 1128 (4th Cir. 1981) .. 15

United States v. Guglielmini, 384 F.2d 606 (2nd Cir. 1967) 22

United States v. Henry, 447 U.S. 264 (1980) 18

United States v. Kaiser, 599 F.2d 942 (10th Cir. 1979) .. 14

United States v. Kennington (C.A.5), No. 80-7521, June 15, 1981 12

United States v. Martin, 438 F.2d 974 (5th Cir. 1973) ... 16

United States v. Martinez, 588 F.2d 495 (5th Cir. 1979) . 19

United States v. Nicholas, 488 F.2d 622 9

United States v. Raddatz, 592 F.2d 978 (7th Cir. 1979) .. 11

United States v. Reed, 572 F.2d 412, 423 cert. denied 439 U.S. 913 8

United States v. Roberts, 644 F.2d 683 (8th Cir. 1981) .. 11

United States v. Stipe (C.A.10), No. 81-1417, July 1, 1981 15

United States v. Weaver, 594 F.2d 1272 (9th Cir. 1979) . 15

U.S. v. Cravero, C.A.Fla.1977, 545 F.2d 406, certiorari denied 97 S.Ct. 1123, 429 U.S. 1100, 51 L.Ed.2d 549, certiorari denied 97 S.Ct. 1679, 430 U.S. 983, 52 L.Ed.2d 377, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279, rehearing denied 97 S.Ct. 2990, 433 U.S. 915, 53 L.Ed.2d 1102 15

U.S. v. Collins, 652 F.2d 735 (8th Cir. 1981) 1,8

Statutes:

28 U.S.C.A. 1254(1) 2

Title 21, U.S.C. Section 841 2,12,13,18

Title 28, U.S.C. Section 636(b)(1) 3,6,10

Federal Rules of Evidence Rule 801(d)(2)(E) 4,14

Miscellaneous:

U.S. Constitution, Amendment IV 2,8,9

U.S. Constitution, Amendment V 2,17,18

U.S. Constitution, Amendment VI 2,17

No.

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1981

PEGGY COLLINS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals,
Eighth Circuit

Peggy Collins, petitioner, prays that a writ of certiorari be issued to review the order of the United States Court of Appeals, Eighth Circuit, affirming the judgment of conviction of the United States District Court, Eastern District of Missouri, Eastern Divison, and denying petitioner's petition for rehearing.

OPINION BELOW

The decision of the Eighth Circuit Court of Appeals affirming the judgment of conviction of the United States District Court is reported as *U.S.* v. *Collins,* 652 F.2d 735 (8th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, affirming petitioner's conviction was entered on June 23, 1981; the petition for rehearing and suggestions for rehearing en banc was denied August 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

STATUTES AND RULES INVOLVED

1) The Constitution of the United States, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2) The Constitution of the United States, Amendment V, provides:

> No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

3) The Constitution of the United States, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for his defence.

4) Title 21, U.S.C. § 841, provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. ... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment ...

(2)(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug ..., such person shall ... be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. ... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment ...

5) Title 28, U.S.C. § 636(b)(1), provides:

Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion ... to suppress evidence in a criminal case, ...

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

6) Federal Rules of Evidence Rule 801(d)(2)(E), 28 U.S.C.A., provides:

> (d) *Statements which are not hearsay.* A statement is not hearsay if —
>
> > (2) *Admission by party-opponent.* The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

On July 10, 1980, petitioner was arrested by St. Louis County Police officers and agents of the Drug Enforcement Agency at 9:40 p.m. while in the upstairs bedroom of her townhouse apartment. The officers had gained entry to the premises by setting up a drug buy with Tom Schlueter, a friend of the petitioner. At the hearing on her motion to suppress evidence, undercover agent Carter testified that Schlueter told him he had a key to the apartment and that the key had been used to gain entry. Schlueter, who did not testify at the hearing, stated at trial that he had returned the key to petitioner the night previous to the "bust" and had only appeared to use the key to get in the apartment, the door being unlocked.

Although arrangements for this transaction were completed the day before the arrest, no warrants were obtained for either search of the apartment or seizure of any items or persons.

The officers knew petitoner was at home when they arrived there July 10th because her home had been under surveillance since about 6:30 that evening.

Upon entering the apartment Schlueter removed from inside a coffee table a bag containing tablets later identified as methaqualone, whereupon he was arrested and other officers rushed into the appartment, went upstairs and arrested petitioner. After her refusal to make any statement, she was taken downstairs and seated on a couch facing the coffee table and bag for about 30 minutes. Then she and Schlueter were taken, in separate cars, to the DEA Office for additional questioning. Enroute, petitioner asked why she was being arrested because there were 5,000 quaaludes in her front room. When the officers attempted to question her further, she refused to say anything else. Later that night, after giving a full confession and implicating petitioner, Schlueter was placed in a holdover cell with

petitioner, who still declined to make any statement to the agents. Schlueter testified that the petitioner asked him what he had told the agents and that, after he said he had told them the truth, she stated that if she didn't pay for those pills, "I'm dead". Both were released the next day on bond.

On July 24, 1980, both parties were charged in a four-count indictment: Schlueter and petitioner Collins being jointly charged in the first two counts with possession of a controlled substance with intent to distribute in on July 20, 1980, and conspiracy to commit such offense; Schlueter alone was charged in the last two counts with distribution of controlled substances on two prior occasions.

At the time of the arraignment, petitioner was given a copy of the indictment, on the face of which was information advising her of the penalties attendant to the charges against both her and Schlueter (Appendix C). On September 2nd, a hearing was held on her motion to suppress evidence, before U.S. Magistrate David Noce, in accordance with Sec. 636(b)(1), 28 U.S.C.A. Two days later he filed his report recommending that the motion be denied. The following day, September 5th, Schlueter entered a plea of guilty to one count of the indictment pursuant to a plea-bargain agreement whereby, in exchange for his testimony at petitioner's trial, the government would move for dismissal of the other three counts against him at the time of his sentencing. Petitioner's trial, scheduled for September 8, 1980, commenced on September 10th, and the jury returned verdicts of guilty on both Counts I and II on September 17, 1980.

At the time of petitioner's sentencing, the court advised that information had been received that inasmuch as methaqualone is a non-narcotic drug, the maximum prison term is five, rather than 15, years as previously noted on the court file. Petitioner was then sentenced to a term of three years in prison to be

followed by the mandatory special parole term of five years on Count I; the imposition of sentence on Count II, the conspiracy charge, was suspended and she was placed on probation for three years following completion of the sentence imposed on Count I. She is presently incarcerated at the women's correctional institution at Fort Worth, Texas.

REASONS FOR GRANTING THE WRIT

I.

If a man's home is truly his "castle", then the Fourth Amendment can be said to be the "moat" protecting his right to be secure there, which moat can only be bridged by a warrant. This absolute prohibition against invasion of the sanctity of the home, earlier pronounced by the Second Circuit in *United States* v. *Reed,* 572 F.2d 412, 423, cert. denied 439 U.S. 913, was reinforced by this Court in April 1980 in *Payton* v. *New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639.

The court of appeals in the case at bar contravened this principle, relying on "facts" which not only were not in evidence, but which are contradicted by the testimony. To set the record straight, Schlueter and petitioner were not "seen entering her apartment together the night before", nor had he "done business over the phone at the apartment". *United States* v. *Collins,* 652 F.2d 735, 739. According to the testimony, police officers had seen Schlueter arrive at petitioner's apartment the night before the arrest; he went in and remained about 40 minutes, whereupon the two of them walked outside and conversed for 5 minutes before he left and went home. Rather than "doing business over the phone" there, Officer Carter, the undercover officer, testified that during one of his telephone conversations with Schlueter, he was told that Schlueter would not be at home that evening, but could be reached by calling a certain telephone number, which was later found to be listed to the petitioner. There was no inference that his being at her apartment that evening was for any purpose other than social, which was consistent with testimony that the two had been intimate for several months.

The *Payton* decision is very much in point with this case. Admittedly, the sole purpose of going to petitioner's home the

night of July 10th was to arrest Schlueter and, hopefully, his "source", whom they thought to be petitioner. From the time Peggy Collins' name was first mentioned by Schlueter to the agents as being one who could act as a go-between in supplying the drugs, she became a target of their investigation, although no attempt was made to ascertain any background information about her or with whom she shared her apartment.

Since this operation was, in the words of a government attorney,[1] a typical "buy-bust" operation, there was no claim of any exigent circumstances which would negate the necessity of obtaining warrants for the arrest of the parties they believed to be involved and whom they expected to be in the home that night. This violates the rule that police activity which is denominated as "routine police procedure" is not, nor can it be, exempt from the restrictions imposed by the Fourth Amendment. *United States* v. *Nicholas,* 488 F.2d 622, 625. This investigation had been on-going since February of that year, with previous "buys" from Schlueter taking place at his apartment. Not until July 7th did Schlueter mention having the next transaction take place at petitioner's home. The details for this were "firmed-up" on July 9th, and agents had all the next day in which to apply for warrants to validate their entry and arrest, but they made no attempt to do so, although they had knowledge of the "place to be searched, and the persons or things to be seized". *U.S. Const. Amend. IV.*

In upholding the entry into petitioner's home and the seizure of items found there, the court of appeals relied on *Lewis* v. *United States,* 385 U.S. 206 (1966), a pre-Payton case. A crucial factual distinction of Lewis is that there the arrest of the seller of narcotics took place in his own home, not that of a friend,

---

[1] Transcript of Motion Hearing, p. 10

and such home had been utilized on two prior occasions for unlawful narcotic transactions, turning it into a commercial area for purposes of search and seizure. That case might have been controlling had the arrest of Schlueter been conducted at his own apartment, rather than petitioner's.

Petitioner complained on appeal that the trial court erred by refusing to make a de novo review of the magistrate's recommendation for denial of her motion to suppress evidence upon her filing of objections thereto. *28 U.S.C. § 636 (b)(1); Hill* v. *Duriron Co., Inc.* (C.A. 6), No. 79-3635, Aug. 12, 1981. There was no indication, moreover, that the court had even read the transcript of the hearing before the magistrate prior to adopting the recommendation. *United States* v. *Elsoffer,* 644 F.2d 357 (5th Cir. 1981); *Calderon* v. *The Waco Lighthouse for the Blind,* 630 F.2d 352, 356 (5th Cir. 1980).

In making his recommendation, the magistrate relied on the testimony of the only witnesses produced by the government at the hearing, the police officers, who stated that Schlueter had a key to petitioner's apartment which he used to gain entrance. It is understandable that the magistrate apparently sanctioned the entry based on Schlueter's common authority over the premises as evidenced by his using a key to enter. *United States* v. *Dubrofsky,* 581 F.2d 108, 212 (9th Cir. 1978).

However, three days after such hearing, and the day following the filing of the magistrate's recommendations, Schlueter entered his plea of guilty, at which time he advised the government that he had returned the key to Peggy the night before the entry. In light of this new development, the police officers had to water down their later testimony at trial and state that they only thought he had used a key, in order to conform their testimony to that anticipated of the government's prime witness, former co-defendant Schlueter. Had this testimony been before the magistrate, it is highly conceivable that the recommendation would have been different.

Petitioner's timely objections to the magistrate's recommendations were received by the court and the government on September 10th, five days after Schlueter's plea. At that time the government was aware of the newly discovered testimony, which conflicted materially with that before the magistrate, but ignored its duty to reveal this to the court. However, it necessarily would have come to light had the court made a de novo review as requested by petitioner and mandated by the statute. *United States* v. *Raddatz,* 592 F.2d 978 (7th Cir. 1979); *Coolidge* v. *Schooner California,* 637 F.2d 1321 (9th Cir. 1981).

The rule applicable to seizure of evidence in plain view was pronounced by this Court in 1971 in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. This rule was ignored by the court of appeals when it sanctioned the admission into evidence of the bag containing the quaalude tablets taken from petitioner's home. According to the government,[2] seizure of these articles was justified because they were in "plain view". Granted, once Schlueter removed the bag from inside a table and placed it on top of the table, it was in plain view. Where the government's argument departs from the permissible scope of the doctrine, is that the officer entered the apartment with Schlueter for the express purpose of purchasing those same tablets, which Schlueter had told him would be on the premises. This expectation of finding certain evidence is violative of the requirement of *Coolidge, supra,* that the officers come across the evidence "inadvertently". See *Annot.* 29 L.Ed.2d 1067, 1075.

The Eighth Circuit itself recently recognized this requirement when it upheld the suppression of evidence because the police officers knew exactly what they were looking for and what they might reasonably expect to find. *United States* v. *Roberts,* 644 F.2d 683 (8th Cir. 1981).

---

[2] Transcript of Motion Hearing, p. 10, lines 14-17)

That the protection guaranteed by the Fourth Amendment and the safeguards of the statutes can be defeated so easily by the premeditated actions of government agents shocks the conscience. Only this Court can remedy the violations of petitioner's Constitutional rights by the police in the warrantless entry into her home, by the government in the unbridled use of the items improperly seized therefrom, and by the trial court's failure to conduct the necessary hearings regarding the evidence seized.

II.

The Second Circuit Court of Appeals has well stated that the first function of an indictment is to inform the defendant of the offense charged with sufficient clarity so that "he will not be misled while preparing his defense". *United States* v. *Brozyna,* 571 F.2d 742, 746 (2nd Cir. 1978). Ignoring this concept, the court of appeals in the case at bar, while admitting that the indictment which was provided petitioner contained erroneous information, ruled that since the statutory citations on the indictment were correct she was sufficiently apprised of the charges against her. This ruling ignores the fact that the statutory citation, Title 21, U.S.C. § 841(a)(1), applies to crimes involving both narcotic and non-narcotic substances, without advising to which catagory of substances the charge pertains. There is a substantial difference in the punishment ranges of the two types, which can be a crucial element in the preparation and manner of defending a charge.

The importance of properly advising an accused of this aspect of the charge was recognized by the Fifth Circuit Court of Appeals when finding no error in a miscitation contained in the caption of the indictment since defendant had been put on notice of the *sentencing provisions* applicable to the charge. *United States* v. *Kennington* (C.A.5), No. 80-7521, June 15, 1981. (emphasis supplied)

Petitioner was advised by the indictment provided her by the government (Appendix C) that the term of imprisonment for each count was a maximum of 15 years, effectively placing her on notice that, under 21 U.S.C. 841 (a)(1), she had been charged with crimes involving a narcotic drug. This obviously was to have a great affect on the preparation and manner of her defense. Consider the following:

(1) Co-defendant Schlueter entered into a plea-bargain agreement to plead guilty to 1 of the 4 counts against him in exchange for dismissal of the other 3, if he would testify for the government against petitioner, reducing his potential term of imprisonment from 60 years to 15 (he, too, was under the mistaken impression that the charges involved narcotics, having received identical information on the indictment provided him). Petitioner, on the other hand, having little to gain by such offer as she was charged in only 2 counts, chose to stand trial. A question arises if she would have taken this course had she known that the maximum prison term for her under a comparable plea-bargain agreement would be only 5 years (rather than 15).

(2) Because of the attitude of the general public towards "narcotics", counsel for the defense was careful during trial to avoid use of that word, when he could have stressed to the jury that petitioner was charged with an offense involving only a *non*-narcotic substance, had defendant been apprised of the correct charge.

(3) During trial the court several times stated to the jury that the possible term of imprisonment for each of the charges was a maximum of 15 years. While consideration of the punishment for a crime is not within the purview of the jury, logic dictates that a person charged with crimes commanding 15-year prison terms is to be viewed with greater apprehension than one accused of offenses carrying only 5-year terms.

Petitioner, therefore, was greatly prejudiced by being misled as to the exact nature of the charges against her. *United States* v. *Kaiser,* 599 F.2d 942 (10th Cir. 1979). Because of the stated length of the prison terms, she was misled into declining to enter into plea-bargaining and was caused to incur considerable financial expense for a trial. She was also prejudiced in the eyes of the jury because of the implied magnitude of the offenses with which she was apparently charged. This false information was also presented to the probation officer for his consideration in pre-sentence investigation. The fact that the judge discovered the error prior to sentencing and imposed terms appropriate to non-narcotic offenses cannot erase the deception practiced upon petitioner and the jury, and the resultant prejudice.

This error concerning the exact nature of the charges against her, which misled petitioner in preparing her defense, constituted an unconscionable departure from the accepted course of judicial proceedings and should not have been sanctioned by the court of appeals.

III.

One of the exceptions to the hearsay rule is that permitting admission of statements of a co-conspirator during the course and in furtherance of the conspiracy. Fed.R.Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

Inherent in this rule is the necessity for finding that, when the questionable statement was made, there was a conspiracy in existence and defendant was a part of it, and that the statement was made in furtherance of such conspiracy. However, the various circuits differ as to when such a finding is to be made. The Ninth and Tenth Circuits, for example, follow the logical rule that independent proof of the conspiracy and defendant's membership in it must come first, before the out-of-court declarations of the alleged co-conspirator can be used as

evidence. *United States* v. *Weaver,* 594 F.2d 1272 (9th Cir. 1979); *United States* v. *Stipe* (C.A.10), No. 81-1417, July 1, 1981.

The Fifth Circuit, also, has ruled that a witness can testify to declarations of a co-conspirator only if the government establishes by independent evidence the existence of the conspiracy and connects both the declarant and the defendant to it. *U.S.* v. *Cravero,* C.A.Fla.1977, 545 F.2d 406, certiorari denied 97 S.Ct. 1123, 429 U.S. 1100, 51 L.Ed.2d 549, certiorari denied 97 S.Ct. 1679, 430 U.S. 983, 52 L.Ed.2d 377, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279, rehearing denied 97 S.Ct. 2990, 433 U.S. 915, 53 L.Ed.2d 1102.

Conversely, the Eighth Circuit has in this case sanctioned the "conditional" admission of hearsay testimony by police officers during the first days of petitioner's trial, subject to the government later proving the existence of a conspiracy by independent evidence. This "independent" evidence amounted to the later testimony by the alleged co-conspirator, Schlueter, reiterating for the most part what the officers had earlier said he told them, although his testimony in other respects differed markedly from that of the officers. *United States* v. *Gresko,* 632 F.2d 1128 (4th Cir. 1981). Moreover, the testimony of the officers, repeating what Schlueter had told them that petitioner had said to him, amounted to double hearsay.

This is exactly the situation censured by Circuit Judge Doyle, speaking for the court in *United States* v. *Stipe, supra,* when the held that the statements of co-conspirators do not prove a conspiracy. In that case the government sought to allow hearsy statements to be received on a conditional basis subject to "connecting it up". As Judge Doyle observed, by the time the "connected up" stage arrives, the evidence is blended so that there is no distinction between hearsay and non-hearsay. So saying, he affirmed the ruling of the lower court that the government was

first required to prove a conspiracy, membership and furtherance by independent evidence before offering the hearsay testimony.

In ruling on the admissibility of the officers' hearsay testimony in the case at bar, District Judge Wangelin did not state what evidence he found to be the "independent" proof necessary to establish the conspiracy. However, the court of appeals felt that it was found in the question asked the officers by petitioner enroute to the DEA Office regarding the reason for her arrest.[3] The court reasoned that since "everyone believed the bag to contain 10,000 tablets", petitioner's reference to 5,000 (which the bag was found to actually contain) was proof of her membership in the conspiracy. Where this reasoning fails is that, if "everyone" (meaning Schlueter as well as the undercover agents) expected the bag to contain 10,000 tablets, petitioner could not have been a partner with Schueter in the transaction if she alone knew the exact amount. Moreover, the court ignored the fact that, following her arrest and intitial questioning, petitioner alone was seated for about 30 minutes at the table containing the bag, which bore a tape marked "5,000". Although the government's witnesses denied seeing the tape and markings before examining the bag closely at the DEA Office, there was no evidence that petitioner could not have observed it while seated beside it; further, one of the officers testified that while petitioner was seated there another officer in the room remarked about the quaaludes on the table. Therefore, while petitioner's apparent knowledge of the amount of tablets in the bag might infer knowledge of the substance, it can in no way support a charge or finding of conspiracy. *Cleaver* v. *United States,* 238 F.2d 766; *United States* v. *Collins,* 522 F.2d 243 (8th Cir.1977); *United States* v. *Martin,* 483 F.2d 974 (5th Cir.1973).

---

[3] Officer Webb testified at trial that petitioner asked "why she was being arrested because there were 5,000 Quaaludes in her front room." (Trial Transcript, p. 472)

This case emphasizes how easily a person can be placed in jeopardy on merely the word of another. The government's entire case rested on the statements and testimony of Thomas Schlueter. There was no independent evidence linking Peggy Collins (petitioner) to the posession or sale of the narcotics: she committed no overt act, nor was she physically present during any of the negotiations or transactions with the agents. Her only affirmative act in the case was to ask why she was being arrested for drugs in her apartment.[4]

By affirming petitioner's conviction, based upon the use of hearsay testimony alone, the court of appeals failed to protect her right to due process and a fair trial.

IV.

The sequence of events and actions of the government agents following the arrest of petitioner and her refusal to make any statement, strongly suggests the intentional creation by them of a situation likely to induce her to incriminate herself in violation of her Fifth and Sixth Amendment rights.

From the time of their entry into petitioner's home, the officers scrupulously kept the two arrestees, Schlueter and Collins, apart: they were questioned on separate floors of the apartment; driven to the DEA Office in separate cars; and questioned separately at the DEA Office. It was only after Schlueter made a confession and written statement, implicating petitioner, that they placed them, unattended, in the same holdover cell. All this time petitioner had steadfastly refused to make any statement or give any information incriminating herself or others.

---

[4] There was testimony from at least one officer that they were award petitioner shared her apartment with someone, but they made no effort to determine the identity of that other person.

Based upon the undercover agent's earlier phone conversations with Schlueter, all of which had been recorded, the officers knew of the close personal relationship which existed between the two arrestees and, therefore, could reasonably assume that as soon as they were left alone together some conversation would ensue regarding the events that took place that night. Moreover, there was never any doubt that they would use Schlueter's testimony and statements against petitioner: witness the fact that from the earliest stages of the proceedings her requests for disclosure of any written statements of her co-defendant were denied as being "Jencks material".

The obvious conclusion to be derived from these facts is that it was intended that Schlueter be used to elicit incriminating statements from petitioner after she had invoked her Fifth Amendment and Miranda rights, the situation denounced by this Court in *United States* v. *Henry,* 447 U.S. 264 (1980).

V.

Throughout her trial and the subsequent proceedings petitioner has been penalized because she chose to stand mute and force the government to bear the burden of proving her guilty of the charges, as is her Constitutional right. Nowhere is this made more clear than by the court of appeals' opinion with regard to the refusal of the lower court to instruct the jury on the lesser included offense.

Petitioner was charged with possession of controlled substances with intent to distribute and conspiracy to commit such offense 18 U.S.C. 841(a)(1). In order to obtain a conviction, the government had the burden of proving, first, that she possessed the substances and, second, that she did so with the intent to distribute them. The only evidence produced by the government to show such intent to distribute was the uncorroborated testimony of Thomas Schlueter, who said she had placed them inside the table for him to pick up.

It is undisputed that possession of a controlled substance is a lesser included offense of possession with intent to distribute. In fact, it has been held that possession, relative to the crime of possession with intent to distribute, is a prototypal lesser included offense. *United States* v. *Burns,* 624 F.2d 95, 104 (10th Cir.1980), cert. denied ____ U.S. ____, 101 S.Ct. 361, 66 L.Ed.2d 219. However, the court of appeals upheld the trial court's refusal to instruct on the offense of possession, citing as its reason petitioner's failure to produce evidence that she might be guilty of possession instead of possession with intent to distribute.

> The appellant presented no evidence at trial. The claim throughout the trial was complete innocence. The jury either believed she had nothing to do with the transaction or was guilty as charged. There was not a rational basis for instructing the jury on lesser included offenses and hence we find no error in the trial court's refusal to give the requested instructions. 652 F.2d at 742 (citations omitted)

The government's case rested primarily on petitioner's "constructive possession" of the tablets, which may be proven by "ownership, dominion or control of the contraband itself, or dominion or control *over the premises* or the vehicle in which the contraband was concealed." *United States* v. *Martinez,* 588 F.2d 495, 498 (5th Cir. 1979) (emphasis supplied). In his closing argument the government's attorney stressed this point to the jury:

> ... That just like you're upstairs and somebody's downstairs controlling your television. Well, you got constructive possession of it even though they may be in actual possession of it and that's what we've got in this case. Defendant had constructive possession of those Methaqualone tablets. (Trial Tr. p. 534)

This was a fitting example for him to use inasmuch as petitioner had been found upstairs on her bed after Schlueter's arrest downstairs with the tablets.

Following closing arguments, the court instructed the jury, *inter alia,* that, "A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it." (Trial Tr. p. 579).

Since the government's arguments focused on constructive possession, the jury should have been free to determine whether to believe the statements of the co-defendant-turned-government-witness as to petitioner's intent to distribute the substances. Nor could the jury be compelled to infer such intent from the quantity of the substance. *United States* v. *Brischetto,* 538 F.2d 208 (8th Cir.1976).

Citing *Brischetto,* the Tenth Circuit in *United States* v. *Burns, supra,* ruled that even though evidence supports a finding of possession with intent to distribute, the court should also instruct on the simple offense of possession. See also *Keeble* v. *United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973).

By standing mute, petitioner did not claim "complete innocence", as maintained by the court of appeals. She was merely exercising her right to demand that the government prove guilt as charged. (See argment VI, *infra*) There was no doubt that she lived in the apartment, nor that the tablets were removed by Schlueter from a table in her living room. There was a jury question, however, regarding whether she had placed the tablets in the table for Schlueter to distribute or if, having previously had a key to the premises, he had secreted them there himself.

Thus, the jury could rationally have found petitioner guilty of the lesser offense of (constructive) possession and have acquitted her of the greater charge of possession with intent to distribute. *Keeble* v. *United States,* 36 L.Ed.2d at 847. By denying the jury this option, the court violated petitioner's rights to due process and a fair trial.

VI.

"I tell you again that your sole purpose, ladies and gentlemen, is to find upon guilt *or innocence.*" (emphasis supplied). So saying,[5] the trial court sent the jury to its deliberations.

The Second Circuit has held that any intimation that a defendant has any burden at all is dangerous. *United States* v. *Rosa,* 493 F.2d 1191, presented a like situation in that the court indicated to the jury that the "guilt or innocence" of the defendant should be determined beyond a reasonable doubt.

The remark of Judge Wangelin in the case at bar was not an unintentional slip of the tongue, as was the situation in *Rosa, supra,* inasmuch as he had just minutes before, when instructing the jurors how to fill in the verdict form, stated:

> In the blanks you will write the words "Guilty" or "innocent" as the case may be in both blanks. (*supra,* n. 5)

At the heart of the American system of criminal justice is the principle that a person is presumed innocent until proven guilty. Keeping in mind this basic tenet, juries have correctly been instructed that they have the duty to find a defendant guilty or not guilty as charged, reminding them that the government has the burden of proving the charges against the defendant.

---

[5] Transcript of trial, p. 583

By instructing them as he did in this case, the court implied that no longer was there a presumption of innocence, it was not up to the jury to make a finding thereof, shifting the burden of proof to petitioner. This requirement that she prove her innocence impermissably emphasized the fact that she had called no witnesses, presented no evidence nor testified to her innocence.

Therefore, petitioner's right to a fair trial and to rely on the government's necessity of proving her guilt by a preponderance of the evidence was adversely affected by the charge of the trial court which shifted the burden to her. *United States* v. *Guglielmini,* 384 F.2d 606 (2nd Cir.1967).

CONCLUSION

Petitioner respectfully submits that a writ of certiorari should be issued to review the judgment and order of the Eighth Circuit Court of Appeals inasmuch as the decision of that Court is in conflict with the decisions of other federal courts of appeals and this Court, and because such court of appeals has sanctioned so far a departure from the accepted and usual course of judicial proceedings by the lower court as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

DAVID C. GODFREY, MBE
15389
130 S. Bemiston, Suite 502
Clayton, Missouri 63105
(314) 721-3383

Attorney for Petitioner

APPENDIX

APPENDIX A

JUDGMENT

United States Court of Appeals
For The Eighth Circuit

No. 80-1964

September Term, 1980

United States of America,
Appellee,

vs.

Peggy Collins,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause was heard on a designated record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

After consideration it is now ordered and adjudged that the judgment and commitment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

June 23, 1981

A true copy:

Attest: Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.

8/20/81

APPENDIX B

United States Court Of Appeals
For The Eighth Circuit

No. 80-1964

September Term, 1980

United States of America,
Appellee,

vs.

Peggy Collins,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

August 5, 1981

APPENDIX C

MAGISTRATE

United States District Court
Eastern District Of Missouri
Eastern Division

(Suppressed)

No. 80-121 CR (1)

United States of America,
Plaintiff,

v.

Thomas V. Schlueter and
Peggy Collins,
Defendants.

COUNT I

The Grand Jury charges:

That on or about the 10th day of July, 1980, in St. Louis, Missouri, within the Eastern District of Missouri,

THOMAS V. SCHLUETER and
PEGGY COLLINS,

the defendants herein, did knowingly and intentionally possess with intent to distribute methaqualone, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2(a).

COUNT II

The Grand Jury further charges:

That from on or about February 21, 1980, continuing to on or about July 10, 1980, in St. Louis, Missouri, within the Eastern District of Missouri,

THOMAS V. SCHLUETER and
PEGGY COLLINS,

the defendants herein, did unlawfully, knowingly and willfully combine, conspire, confederate and agree together, to commit offenses against the United States. They conspired and agreed together to knowingly and intentionally possess with the
Bonds for defendants Schlueter and Collins - $10,000.00 each.

Penalty: Schlueter - Counts I, III & IV - F nm 25,000 or I nm 15 y or b, to be followed by a minimum mandatory special parole term of 3 years to life. Count II - F nm 25,000 or I nm 15 y or b.

Collins - Count I - F nm 25,000 or I nm 15 y or b, to be followed by a minimum mandatory special parole term of 3 years to life. Count II - F nm 25,000 or I nm 15 y or b.

Appendix

Office - Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

81-649
No.

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1981

PEGGY COLLINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals,
Eighth Circuit

DAVID C. GODFREY, MBE 15389
130 S. Bemiston, Suite 502
Clayton, Missouri 63105
(314) 721-3383
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No.

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1981

PEGGY COLLINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1964

United States of America,
Appellee,

vs.

Peggy Collins,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: March 13, 1981

Filed: June 23, 1981

Before BRIGHT and ROSS, Circuit Judges, and HARRIS,*
Senior District Judge.

HARRIS, Senior District Judge

Appellant, Peggy Collins, was convicted by a jury in the District Court of the Eastern District of Missouri,[1] on one count of possession of a controlled substance with intent to distribute and one count of conspiracy to possess a controlled substance with intent to distribute. This appeal challenges the two convictions.

An investigation by Drug Enforcement Administration (DEA) agents into the drug dealings of Thomas V. Schleuter resulted in the arrest of Schleuter and appellant. According to a confidential informant, Schleuter had said he could obtain 20,000 quaalude tablets from a pharmaceutical company. Subsequently, Officer Bill Carter, working in an undercover capacity, contacted Schleuter, and on February 21, 1981, purchased 100 methaqualone or "quaalude" tablets at Schleuter's apartment.

After this initial contact, Carter and Schleuter conversed several times to arrange future purchases. On April 2, 1980,

---

* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

[1] The Honorable H. Kenneth Wangelin presiding.

Schleuter gave Carter a number where he could be reached that night. This number was listed to the appellant, Collins. Appellant and Schleuter were close friends and he had a key to her apartment.

A second transaction between Carter and Schleuter occurred on April 8, 1980. This sale, of some 500 tables, was again made at Schleuter's apartment.

In order to discover Schleuter's source, DEA agents decided to purchase 10,000 methaqualone tablets. On July 7, 1980, Schleuter informed Carter the next sale would be at Collins' apartment and that he had a key. On July 9, 1980, the deal was confirmed for the following night. Later that same evening, Carter and two other officers began a surveillance of the apartment. Schleuter was observed arriving, going into the apartment and coming out with the appellant. Schleuter then left and went to his apartment.

At 8:30 p.m. the following night, Carter drove to Schleuter's apartment. He and another officer gave $28,500.00 to Schleuter, then followed him to appellant's apartment. When they arrived, Collins was seen standing at the upstairs window. She remained upstairs. Carter went to the apartment with Schleuter, who opened the door and entered. Schleuter went directly to a coffee table, opened a sliding door, and pulled out a white trash bag. Inside was a brown bag containing a large number of tablets.

As soon as he saw the tablets, Carter signalled the other officers, identified himself to Schleuter, and arrested him. Appellant was arrested upstairs and informed of her rights. Schleuter was then taken upstairs and appellant brought downstairs and seated on the couch behind the coffee table. Schleuter and appellant were questioned separately. While upstairs, Schleuter told the officers Collins was his source or supplier.

Collins and Schleuter were transported to DEA headquarters, where they were placed in the same hold-over cell. Schleuter testified Collins asked him what he had said. Schleuter told her "the truth" and she responded, "Well, either I'm going to have to pay for these quaaludes or I'm dead." Early on July 11, 1980, Schleuter gave a handwritten statement naming the appellant as his source for the methaqualone.

Appellant was indicted on July 28, 1980. On the indictment, there was a notation which recited the amount of bond and that each statutory charge carried a penalty of a maximum fine of $25,000.00 and a prison term of up to 15 years. Count I also contained a mandatory special parole term of three years to life.

Schleuter, pursuant to a plea bargain agreement, plead guilty to Count I three days before the scheduled trial and testified against the appellant. The government's motion to dismiss the other three counts of the indictment against him was pending during the appellant's trial.

Appellant argues numerous points for reversal.

I.

Appellant first argues that she wsa not properly informed of the charges against her and, hence, could not prepare an adequate defense or make appropriate decisions. The notation on her copy of the indictment concerning the range of punishment was that for a narcotic drug. Appellant's charges involved methaqualone, a non-narcotic controlled substance. Since the range of punishment for a non-narcotic is different, the information noted on the indictment was erroneous.

The purpose of an indictment is to inform the accused of the nature of the charges. It should be specific enought to avoid the danger of his again being prosecuted for the same offense. *Hayes* v. *U.S.*, 296 F.2d 657 (8th Cir. 1961). The statutory citations on the indictment were correct. The appellant was apprised

of the transaction and the charges against her. Appellant has pointed to no specific prejudice, but rather speculates on actions which she might have taken had the correct information been given. We fail to see that Collins was prejudiced by this information.

The appellant also contends the erroneous punishment information was put before the jury by the Court. The record reflects the trial judge informed the jury of the possible penalty (the erroneous one noted on the indictment), but only after the appellant's counsel had raised the issue in his cross-examination of Schleuter. Defense counsel asked Schleuter if he could have received up to 15 years on each count which had been dismissed after he entered into the plea bargain agreement. The Court then told the jury the charges had not been dismissed and that it was up to the Court to determine if the remaining charges would be dismissed. He also informed them of the possible punishment.

It is true the jury has no concern with the consequences of a verdict. *Government of Virgin Islands* v. *Fredericks*, 578 F.2d 927, 935 (3d Cir. 1978); *Chapman* v. *U.S.*, 443 F.2d 917, 920 (10th Cir. 1971); *Lyles* v. *U.S.*, 254 F.2d 725, 728 (D.C. Cir. 1958); cert. denied 362 U.S. 943. The comment by the Court, however, was made to clear up any misunderstanding created by defense counsel. The information was before the jury due to the actions of the defendant. Furthermore, the Court informed the jury that sentencing in federal court was strictly up to the Court. We find no error requiring reversal.

II.

The second assertion by appellant is that even though a timely motion for discovery was filed, she was not given the handwritten statement of Schleuter, her alleged co-conspirator, prior to trial. She contends this statement was material to her defense. The statement was provided after the direct testimony of Schleuter.

Rule 16 of the Federal Rules of Criminal Procedure does not authorize the discovery or inspection of statements made by government witnesses. Furthermore, 18 U.S.C. § 3500, known as the *Jencks Act,* further excepts this material from discovery. Schleuter was a government witness and his statement was not subject to discovery. There was no error in Collins not being provided with his statement prior to trial.

III.

Appellant next argues the trial court abused its discretion in limiting defense counsel's cross-examination of Detective Carter regarding the entrance into her apartment. Schleuter testified he had returned the apartment key to Collins the night before their arrest. Defense counsel asked Detective Carter several questions about the entry into the apartment.

The trial court has wide discretion in the scope of cross-examination and, absent an abuse of this discretion, will not be reversed. *U.S.* v. *Hitchmon,* 609 F.2d 1098 (5th Cir. 1979); *U.S.* v. *Davis,* 546 F.2d 583, 593 (5th Cir. 1977), cert denied 431 U.S. 906; *U.S.* v. *Dickens,* 417 F.2d 958 (8th Cir. 1969). The record reveals defense counsel thoroughly questioned and explored the subject with Detective Carter before being told to move to another subject. The questions were virtually identical, as were the answers given by Detective Carter. We cannot say the trial court abused its discretion in terminating the questions about the key.

IV.

The next assertion of appellant regards the admission into evidence of the methaqualone and Collins post-arrest statement. Appellant filed timely motions to suppress both of these. These motions were referred to the United States Magistrate pursuant to 26 U.S.C. § 636(b), were heard, and denied.

The drugs in appellant's apartment were seized while Detective Carter was on the premises. Appellant contends that because the government did not have a search warrant, the entry into the apartment made without her permission or the permission of another occupant, was an unreasonable intrusion. Appellant had requested and received her key from Schleuter the night before the arrest, after he had informed her he was in love with another woman. There is a dispute as to how entrance was gained to the apartment. Carter says Schleuter had keys in his hand but he did not actually see Schleuter use them. The government contends Schleuter had free access to the apartment and was in a position to consent to the entrance.

Appellant relies upon *Payton* v. *N.Y.*, 445 U.S. 573 (1980), which holds, ". . . the fourth amendment to the United States Constitution . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." This case struck down a New York statute which allowed police officers to enter a home without consent to make a felony arrest. The officer here, however, entered to purchase drugs at the invitation of a co-defendant. Officer Carter entered the apartment at the invitation of Schleuter. Schleuter and the appellant had been seen entering the apartment together the night before. Schleuter had done business over the phone at the apartment. After counting the money, and prior to leaving for appellant's apartment, Schleuter had excused himself "to call Peggy." Furthermore, Collins observed the entry into her apartment without questioning or confronting them. The evidence supports the finding of the Magistrate that Schleuter and Officer Carter had the consent of Collins to enter and use the apartment. No protest was made by Collins when Schleuter entered. No warrant was needed to enter the apartment. *Lewis* v. *U.S.*, 385 U.S. 206 (1966).

As for the drugs, they were in plain view when seized, within Schleuter's immediate control, and the seizure was incident to a

lawful arrest. Therefore, no warrant was required. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 464-473 (1971); *Chimel* v. *California,* 395 U.S. 752 (1969). We do not find this case to be controlled by *Payton, supra.* The seizure and arrest were made during an undercover drug deal. This would hardly be called a routine felony arrest. Finding the drugs to have been in plain view and within the immediate control of Schleuter, we do not think this was an illegal seizure. The drugs were seized incident to a lawful arrest. We find no error in the refusal to suppress the drugs.

After her arrest upstairs, appellant was brought downstairs and seated on the couch behind the coffee table. The bag with the tablets was on top of the table. Appellant was transported to DEA headquarters by two officers. The officers testified that during the trip "she asked why was she being arrested, just because there were 5000 quaaludes found in her living room?" One of the detectives asked: "Why did you say 5000?" Appellant refused to say anything further.

At DEA headquarters, the tablets were counted. There were 5000 tablets instead of the 10,000 Carter had expected to purchase. A piece of masking tape with "5000" written on it was on the brown bag.

Appellant was advised of her *Miranda* rights at the apartment. She contends her rights were violated, however, because she was not immediately taken to a Magistrate but to DEA headquarters and that the officers interrogated her on the way to the DEA office. She contends her "statement" was not made voluntarily.

Rule 5(a) of the Federal Rules of Criminal Procedure requires an arresting officer to take an arrested person before a Magistrate "without undue delay." Failure to do so may contribute to a determination that a statement made during a period of unnecessary delay is inadmissible. *Mallory* v. *U.S.,*

354 U.S. 449 (1957). The United States Magistrate found the only statement made by appellant came within "20 minutes after her arrest, not during a period of unnecessary delay." We agree. Appellant asked the question and otherwise exercised her right to remain silent.

In connection with the admission of this statement, appellant requested the jury be instructed on what determines whether a statement is made "knowingly." The Court refused to give this instruction, noting the Magistrate had already determined the statement was made voluntarily. As we agree the statement was voluntary, we, therefore, affirm the trial court's refusal to give the requested instruction.

V.

Doyle v. *Ohio,* 426 U.S. 610 (1976,) is relied upon by the appellant in her next contention. Appellant states she was denied a fair trial because the police officers were allowed to comment on her post-arrest silence. This arises from the recitation of the statement made by the appellant in the car concerning the 5000 quaaludes. The officers testified, when asked what she meant, "She refused to make any other statement." The Assistant United States Attorney also remarked on this silence in his opening statement. According to appellant, this was a comment by the prosecution on her exercise of her *Miranda* rights.

In *Doyle, supra,* the Supreme Court held it was a violation of due process for a prosecutor to seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving his *Miranda* warnings. Appellant contends she asked the question because she had seen the piece of tape with "5000" written on it and had heard the officers talking about quaaludes, and was merely trying to ascertain why she was arrested.

The question is whether this was a comment on appellant's silence used for impeachment purposes, or was the mere recitation of her lack of response. The occurrence was post-arrest. Appellant had been given her *Miranda* warnings. She voluntarily spoke. The recitation by the officers that she refused to say anything further was part of the *res gestae;* silence was a part of the conversation initiated by the appellant. We do not believe the recitation that appellant said nothing further was a comment on her silence, but rather a description of the events.

VI.

Appellant argues the trial court committed error when it allowed hearsay testimony to be stated by witnesses during the first days of trial. These witnesses were police officers who testified as to what Schleuter had told them. According to Collins, this testimony was allowed by the trial court even though there had been no determination a conspiracy existed.

The record reveals Judge Wangelin allowed the testimony but did not formally admit it into evidence until the close of the trial. At that time, he stated the government had proved the existence of a conspiracy by a preponderance of the evidence and that all the evidence would be received.

The applicable law is found in *U.S.* v. *Bell,* 573 F.2d 1040, 1043 (8th Cir. 1978).

> It is well-established that an out-of-court declaration of a co-conspirator is admissible against a defendant if the government demonstrated 1) that a conspiracy existed, 2) that the defendant and the declarant were members of the conspiracy and 3) that the declaration was made during the course and in furtherance of the conspiracy.

In *Bell,* we held an out-of-court statement is not hearsay and is admissible if on the independent evidence a district court is satisfied that it is more likely than not that the statement was

made during the course and in the furtherance of an illegal association in which the declarant and the defendant were parties. "The ordinary civil standard of the preponderance of the evidence is sufficient since the District Court is ruling on admissibility rather than ultimate guilt." *Bell, supra,* at 1044.

There is independent evidence in this case to support the decision of the district court to admit the testimony. The question asked of the officers by Ms. Collins concerning the reason for her arrest is such independent evidence. Only 5000 quaaludes were confiscated; 10,000 tablets were expected to be purchased. At the time of her question, everyone believed the bag to contain 10,000 tablets. This is independent evidence sufficient to prove the conspiracy.

We find no error in the trial court's decision to admit the out-of-court statements.

VII.

The admission into evidence of the statement allegedly made to Schleuter while in the cellblock is the next point considered to be error. The statement, "Well, either I'm going to have to pay for those pills or I'm dead.", constitutes an admission by a party-opponent and is admissible under Rule 801 (d)(2), Federal Rules of Evidence.

Appellant argues this statement should not have been admitted because of the manner in which it was obtained. Collins contends Schleuter was placed in a cellblock with her in a deliberate attempt to elicit information from her. This occurred after she indicated she wished to remain silent. She relies upon *U.S.* v. *Henry,* 447 U.S. 264 (1980), in which a defendant was placed in a cell with a paid government informant. In *Henry,* the Supreme Court ruled the subsequent testimony by the informant should have been suppressed as the government had surreptitiously elicited information from a defendant after he had elected to invoke his fifth amendment rights.

The testimony of Schleuter was that appellant began the conversation by asking him what he had told the authorities. Her response to his statement, "the truth", was the above quote. In *U.S.* v. *Lambros,* 564 F.2d 26 (8th Cir. 1977), we held that informal information which is volunteered to a cellmate is admissible. Collins began the conversation with Schleuter. We find this to be voluntary information of an informal nature along the line of that in *Lambros,* and do not find any error in its being admitted as an admission against interest.

VIII.

Appellant contends the trial court erred in not giving instructions on lesser included offenses. For Count I, appellant offered an instruction on possession of a controlled substance. For Count II, she offered an instruction on conspiracy to possess a controlled substance.

U.S. v. *Thompson,* 492 F.2d 359, 362 (8th Cir. 1974), sets out when a requested lesser offense instruction should be given:

> A defendant is entitled to an instruction on a lesser included offense if: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which could justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. . . .

Appellant cites *U.S.* v. *Brischetto,* 538 F.2d 208 (8th Cir. 1976), and states the jury could have inferred she merely possessed the drugs. The quantity seized does not necessarily indicate she had the intent to distribute.

In *Brischetto, supra,* however, the issue of intent to distribute was placed in dispute by conflicting as well as contradictory

testimony. "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone* v. *U.S.*, 380 U.S. 343, 350 (1965).

The appellant presented no evidence at the trial. The claim throughout the trial was complete innocence. The jury either believed she had nothing to do with the transaction or was guilty as charged. There was not a rational basis for instructing the jury on lesser included offenses and hence we find no error in the trial court's refusal to give the requested instructions. *U.S.* v. *King*, 567 F.2d 785 (8th Cir. 1977).

IX.

Appellant contends the court erred in giving an "aiding and abetting" instruction. A conspiracy requires a "meeting of the minds", while only participation is necessary for accomplice liability. In Count I, however, the appellant was not charged with conspiracy but possession with intent to distribute. She was charged under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2(a) which classified her as an aider and abettor punishable as a principal.

Collins argues the "aiding and abetting" instruction permitted the jury to infer that they could find her guilty of both Count I and Count II if they believed she "aided and abetted" Schleuter. She further asserts the Court did not adequately instruct the jury as to the weight to be accorded the testimony of an accomplice.

A review of the instructions reveals the court instructed the jury on conspiracy, statements made in furtherance of a conspiracy, and accomplice liability. The jury was instructed the testimony of an accomplice should be viewed with caution. The court clearly and succinctly defined a conspiracy and charged the jury as to the elements. An instruction was also given as to

the consideration of personal advantage in testimony. Furthermore, the jury was instructed:

> A separate offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to the other offenses charged should not control your verdict as to any other offense charged.

We believe the trial court adequately and correctly instructed the jury as to the applicable law for the charges against appellant.

X.

The verdict forms given to the jury contained blanks in which the jury was instructed to write in its verdicts. The trial court told the jury:

> In the blanks, you will write the words, "Guilty" or "innocent", as the case may be, in both blanks.

Collins contends this implied to the jury there was no longer a presumption of innocence.

The Court instructed the jury it was "in no way suggesting what your verdict or verdicts should be." We do not believe the verdict form in any way suggested the presumption of innocence was gone. We do not find the instruction regarding the verdict forms to be erroneous or require reversal.

XI.

The appellant's last point is that the case should be reversed because of cumulative error. We do not find error in the case or merit in this argument.

Finding no error which requires reversal, we affirm the convictions of the appellant.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS
CLERK

No. 81-649

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEGGY COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated (a) by an agent's entry into petitioner's apartment at the invitation of a co-defendant in order to consummate a drug transaction, under circumstances indicating that petitioner had consented to the entry; or (b) by the subsequent arrest of petitioner and seizure of the drugs.

2. Whether an erroneous notation on the indictment regarding the maximum punishment for the offense with which petitioner was charged requires reversal of her conviction.

3. Whether it was error for the district court, in its control of the order of proof, to admit evidence of co-conspirator statements conditionally, subject to the subsequent introduction of independent evidence of the conspiracy and petitioner's participation in it.

4. Whether the use at trial of petitioner's incriminating statement, volunteered to a jail cellmate who later cooperated with the government, violated petitioner's Sixth Amendment right to the assistance of counsel.

5. Whether the district court erred in refusing to instruct the jury on a lesser included offense.

6. Whether the district court's comment to the jury that its role was to decide on guilt or innocence could have been interpreted by the jury to shift the burden of proof to the defendant.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Chimel v. *California*, 395 U.S. 752	5
Lewis v. *United States*, 385 U.S. 206	4
Payton v. *New York*, 445 U.S. 573	4
Russell v. *United States*, 369 U.S. 749	6
Sansone v. *United States*, 380 U.S. 343	11
Stone v. *United States*, cert. denied, No. 81-5272 (Oct. 13, 1981)	10
United States v. *Andrews*, 585 F.2d 961	7
United States v. *Brischetto*, 538 F.2d 208	11
United States v. *Brown*, 555 F.2d 407, cert. denied, 435 U.S. 904	7
United States v. *Burgos*, 579 F.2d 747	12
United States v. *Busic*, 592 F.2d 13	11-12
United States v. *Chapman*, 615 F.2d 1294, cert. denied, 446 U.S. 967	12
United States v. *Continental Group, Inc.*, 603 F.2d 444, cert. denied, 444 U.S. 1032	7
United States v. *Henry*, 447 U.S. 264	9, 10
United States v. *Lambros*, 564 F.2d 26, cert. denied, 434 U.S. 1074	7
United States v. *Martinez*, 588 F.2d 495	12
United States v. *Phillips*, 577 F.2d 495, cert. denied, 439 U.S. 831	7
United States v. *Santiago*, 582 F.2d 1128	7
United States v. *Silla*, 555 F.2d 703	12
United States v. *Stanchich*, 550 F.2d 1294	7-8

Cases—Continued

	Page
United States v. *Stipe*, 653 F.2d 446	8
United States v. *Testa*, 548 F.2d 847	8
United States v. *Vinson*, 606 F.2d 149, cert. denied, 444 U.S. 1074	7
United States v. *Weaver*, 594 F.2d 1272	8
United States v. *Zemek*, 634 F.2d 1159, cert. denied, 450 U.S. 916	7, 8

Constitution, statutes, and rule:

United States Constitution:	
Fourth Amendment	4
Sixth Amendment	10
21 U.S.C. 841(a)(1)	2, 5
21 U.S.C. 841(b)	5
21 U.S.C. 841(b)(1)(A)	5
21 U.S.C. 841(b)(1)(B)	5
21 U.S.C. 846	2
Fed. R. Evid. 801(d)(2)(E)	7

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-649

PEGGY COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, which is not reproduced as an appendix to the certiorari petition, is reported at 652 F.2d 735.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-1) was entered on June 23, 1981, and a petition for rehearing was denied on August 5, 1981 (Pet. App. A-2). The petition for a writ of certiorari was filed on October 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of possession of a controlled substance with intent to distribute (Count I) and one count of conspiracy to commit that crime (Count III), in violation of 21 U.S.C. 841(a)(1) and 846. She was sentenced to three years' imprisonment on Count I, to be followed by five years' special parole. Imposition of sentence on Count II was suspended in favor of three years' probation, to be served consecutively to the sentence on Count I. The court of appeals affirmed.

The evidence adduced at trial established that petitioner was arrested along with Thomas Schlueter as a result of an undercover investigation into Schlueter's drug dealings. According to a confidential informant, Schlueter had said he could obtain 20,000 methaqualone tablets from a pharmaceutical company. Officer Bill Carter, working as an undercover agent, contacted Schlueter and purchased a number of methaqualone or "quaalude" tablets from him on two separate occasions (Tr. 45-48). At one point in the course of their negotiations, Schlueter gave Carter a telephone number where he said he could be reached that night; the number was listed in the name of petitioner (Tr. 47).

In an effort to discover Schlueter's source for the methaqualone, the DEA agents decided to make a larger purchase of 10,000 tablets (Tr. 195). Schlueter told Carter that the next sale would take place at petitioner's apartment and that he had a key to the apartment (Tr. 52). On the night before the

arranged sale, Schlueter was seen arriving at petitioner's apartment, going in, and coming out with petitioner (Tr. 56-59, 297-299).

On the following evening, Officer Carter and another agent met Schlueter and paid him $28,500. Schlueter counted the money and said he had to call "Peggy" to tell her they were ready (Tr. 63-64, 209). The agents then followed Schlueter to petitioner's apartment. When they arrived, Carter and Schlueter went up to the apartment, and Schlueter opened the door and went in. Schlueter walked directly to a table, opened a sliding door, and pulled out a bag containing a large number of tablets (Tr. 64-65, 344-347). Carter immediately signaled other officers and placed Schlueter under arrest. Petitioner was arrested upstairs, where she had remained; she was advised of her rights and was brought downstairs (Tr. 70-71, 210-214). As she was being taken to the DEA office, petitioner asked why she was being arrested just because there were 5,000 quaaludes in her living room. One of the officers responded, "Why did you say 5,000? What are you talking about, 5,000 quaaludes?" (Tr. 455-456). Petitioner then refused to say anything further. It was later discovered that the bag indeed contained only 5,000 tablets instead of the agreed-upon 10,000 (Tr. 258-260).

Following his arrest, Schlueter told the officers that petitioner was his supplier, and he gave a handwritten statement to the same effect (Tr. 71-73). Shortly before trial, Schlueter pleaded guilty to Count I of the indictment, and he testified against petitioner at trial.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the entry into her apartment and seizure of the methaqualone tablets without a warrant violated her Fourth Amendment rights. She relies on *Payton* v. *New York*, 445 U.S. 573 (1980), in which the Court held that the Fourth Amendment forbids a warrantless and non-consensual entry into a suspect's home for the purpose of making a routine felony arrest.

The court of appeals was correct, however, in its conclusion that *Payton* has no application here. See 652 F.2d at 739. The entry into petitioner's apartment was made at the specific invitation of her co-conspirator, Schlueter, in the course of a drug transaction with an undercover agent. Schlueter and petitioner had been seen entering the apartment the night before, Schlueter had telephoned petitioner about the transaction before they went to the apartment, and Schlueter previously had used the telephone in petitioner's apartment in his dealings. 652 F.2d at 739; see pages 2-3 *supra*. Schlueter freely entered the apartment when he and the undercover agent arrived, and petitioner raised no objection. *Ibid.* In these circumstances, the court of appeals was correct in concluding (*ibid.*) that the evidence supported the magistrate's finding that Schlueter and the undercover agent had petitioner's consent to enter the apartment for purposes of the drug transaction. See *Lewis* v. *United States*, 385 U.S. 206 (1966). In any event, the resolution of this fact-bound issue by the courts below does not warrant further review.

With respect to the seizure of the drugs, petitioner's argument (Pet. 11-12) that the plain view doctrine is inapplicable to the facts of this case is unavailing. As the court of appeals held (652 F.2d

at 739), the seizure here was in any event clearly justified as incident to a lawful arrest. *Chimel* v. *California*, 395 U.S. 752 (1969).

2. Petitioner next objects (Pet. 12-14) to an erroneous notation on her copy of the indictment regarding the maximum penalty for the offense with which she was charged, which she asserts rendered the indictment invalid.[1] The statute under which petitioner was charged, 21 U.S.C. 841(a)(1), applies to unlawful possession or distribution of any controlled substance. The range of penalties provided in 21 U.S.C. 841(b) varies according to the type of substance. Although the charges against petitioner involved methaqualone, a non-narcotic controlled substance, petitioner's copy of the indictment contained a notation of the penalties appliable to narcotic drugs: a maximum of 15 years' imprisonment and a $25,000 fine, instead of five years and $15,000, the maximum for non-narcotic substances (Pet. App. A-4; see 21 U.S.C. 841(b)(1)(A) and 841(b)(1)(B)). The statutory citations, however, were correct (Pet. App. A-3; 652 F.2d at 738).[2]

---

[1] It is unclear from the materials available to us whether the misstatement regarding maximum punishment also was contained in the indictment as returned by the grand jury and filed in the district court. Our argument assumes that it was.

[2] Although petitioner complains (Pet. 13) that the trial court informed the jury of the erroneous possible penalty, it appears from the record that the court did so only to resolve a misunderstanding created by petitioner's counsel, during his cross-examination of Schlueter, concerning the status of the charges against Schlueter (Tr. 367-369). Moreover, as the court of appeals observed (652 F.2d at 738), the district court correctly instructed the jury that sentencing in federal prosecutions is a matter for the court (Tr. 368-369).

The court of appeals correctly held (652 F.2d at 738) that reversal was not required on this ground. The statute under which petitioner was charged was correctly cited, methaqualone was correctly identified as the substance involved, and the date of the transaction was correctly stated (Pet. App. A-3). She cannot complain either that she was unaware of the nature of the charges against her or that she was in danger of being twice put in jeopardy for the same offense. These essential purposes of the indictment therefore were accomplished. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).

Moreover, petitioner has pointed to no specific prejudice that resulted from the erroneous reference on the indictment to the possible punishment for the offenses. She does suggest (Pet. 13) that "[a] question arises" as to whether she would have pleaded guilty if she had known the maximum sentence was less. But petitioner does not assert that she would have pleaded guilty, and it is not clear why the possibility of *lesser* punishment than that noted on the indictment would have led her to do so. Petitioner also speculates (Pet. 13) that if she had been apprised of the correct sentence her attorney could have stressed to the jury that she was charged with an offense involving a non-narcotic drug. This suggestion of possible prejudice is frivolous. Petitioner's possession of the drug was illegal whether it was narcotic or non-narcotic, and there is no reason to believe that the jury would have been impressed with the fact that methaqualone is non-narcotic. In any event, the court expressly instructed the jury that methaqualone is non-narcotic (Tr. 577-578).

3. Petitioner next contends (Pet. 14-15) that the trial court erred when it allowed testimony to be given regarding a statement made by co-conspirator Schlueter (see Fed. R. Evid. 801(d)(2)(E)) before the court had made a determination that a conspiracy existed. We note first that Schlueter testified as a prosecution witness at trial, so that any error in admission of his out-of-court statements is inconsequential.

In any event, contrary to petitioner's claim, the courts consistently have held that independent evidence to show the existence of a conspiracy is not required to be introduced before any co-conspirator declarations are offered. The trial court has discretion over the order of proof of the conspiracy. The statements may be admitted conditionally, at the trial court's discretion, subject to a later presentation of a proper basis for admitting the statements into evidence. *United States* v. *Zemek*, 634 F.2d 1159, 1169 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128, 1131 (7th Cir. 1978); *United States* v. *Phillips*, 577 F.2d 495, 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Lambros*, 564 F.2d 26, 30 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Brown*, 555 F.2d 407, 422-423 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *United*

States v. *Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977).[3]

Petitioner further argues (Pet. 16) that there was insufficient independent evidence of her participation in a conspiracy for the co-conspirator statements to have been admitted. The court of appeals correctly rejected this contention, finding (652 F.2d at 741) that petitioner's own statement in which she revealed that she knew the correct number of tablets in the bag was sufficient independent evidence of the existence of a conspiracy and petitioner's participation in it.[4] In addition to that very persuasive evi-

---

[3] Petitioner errs in contending (Pet. 14-15) that the Ninth and Tenth Circuits have adopted a rule that independent proof of the conspiracy and defendant's membership in it must come first, before the out-of-court declarations of the alleged co-conspirator even can be offered as evidence. In *United States* v. *Stipe*, 653 F.2d 446 (10th Cir. 1981), upon which petitioner relies, the Tenth Circuit indicated only that the *preferred* approach is for the government to introduce independent proof of the conspiracy, not that this approach is required. And in *United States* v. *Weaver*, 594 F.2d 1272, 1274 (9th Cir. 1979), upon which petitioner also relies, the Ninth Circuit quoted its prior decision in *United States* v. *Testa*, 548 F.2d 847 (1977), in which it made clear that the order of proof is a matter for the district court to determine. See also *United States* v. *Zemek*, *supra*.

[4] Petitioner states (Pet. 16) that there was no evidence that she could not have seen a piece of tape on the bag marked "5,000" when she was seated near the seized evidence after her arrest and thereby learned of the contents at that point. From this, she suggests that the reference in her statement to the number of tablets does not necessarily reflect guilty knowledge. Petitioner points to no evidence that she *did* see the marking at that time, however. Moreover, contrary to petitioner's contention, the evidence indicated that the marking could not be seen at the time petitioner was sitting in front of the bag of pills (Tr. 69, 259-260, 348). In any event,

dence, Schlueter himself testified at trial to petitioner's participation in the transaction, and the undercover detective also testified that Schlueter had the agent call him at petitioner's apartment during their drug negotiations (Tr. 47), that Schlueter was seen at petitioner's apartment the night before the final sale (Tr. 56-59), and that the transaction itself took place at petitioner's apartment (Tr. 64-65). Thus, the conclusion by both courts that there was abundant independent evidence of a conspiracy is supported by the record. This fact-bound issue does not warrant further review.

4. Petitioner next objects (Pet. 17-18) to the admission into evidence of a statement she made to Schlueter on the night of their arrest, while they were together in a holdover cell. Schlueter already had confessed and implicated petitioner, while petitioner had asserted her right to remain silent. Schlueter testified that petitioner had asked him what he had told the agents, and he answered that he had told the truth. Schlueter testified that petitioner then stated: "Well, either I'm going to have to pay for these Quaaludes or I'm dead" (Tr. 353).

Petitioner asserts (Pet. 18) that the government agents could have assumed that when the two were placed in the cell together that some conversations about the crime would take place. Relying upon *United States* v. *Henry*, 447 U.S. 264 (1980), she argues that Schlueter therefore was used as a government informant and that the use at trial of the

---

no single piece of independent evidence need be sufficient standing alone to support a conviction. Here, the various pieces of evidence, apart from Schlueter's out-of-court statements, collectively presented a compelling picture of petitioner's guilt.

statement she made to him violated her Sixth Amendment right to the assistance of counsel.

Petitioner's reliance on *Henry* is misplaced. The cellmate to whom incriminating statements were made in *Henry* was a paid government informant who had been working in that capacity for at least a year, a factor that played a significant role in the Court's analysis. 447 U.S. at 270. Here, in contrast, Schlueter was not working as an informant at all. It was not until a few days before the start of petitioner's trial that Schlueter even decided to plead guilty and cooperate with the government. See 652 F.2d at 737-738. And as the court of appeals observed (652 F.2d at 741), it was *petitioner* who initiated the conversation with Schlueter by asking him a question; Schlueter simply responded truthfully to her question, and petitioner then made the statement in issue. Thus, her statement was volunteered without any inducement by Schlueter.

Petitioner nevertheless suggests (Pet. 18) that Schlueter should be likened for present purposes to a paid informant because the government must have intended to make use of his written statement, which also incriminated petitioner. But neither the government's hope for Schlueter's eventual cooperation (even assuming a basis for petitioner's speculation) nor Schlueter's *subsequent* decision to enter a plea, with an apparent anticipation of leniency, is enough to transform him at the time of petitioner's statement into "a Government agent expressly commissioned to secure evidence" from the accused, the situation involved in *Henry*. See 447 U.S. at 273; see also *id.* at 272 n.10. Indeed, this Court has already denied review in another case in which a similar argument was made. See *Stone* v. *United States*, cert. denied, No. 81-5272 (Oct. 13, 1981).

5. Petitioner next challenges (Pet. 18-21) the district court's refusal to instruct the jury on the lesser-included offense of simple possession of a controlled substance in addition to instructing the jury on possession with intent to distribute. The court of appeals correctly sustained the district court's action (652 F.2d at 742), relying upon the rule that such an instruction is not required unless the element differentiating the two offenses is the subject of a factual dispute in the evidence. See *Sansone* v. *United States*, 380 U.S. 343, 350 (1965). As the Court observed in *Sansone*, "to hold otherwise would only invite the jury to pick between the [greater and lesser offenses] so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." *Id.* at 350 n.6. Here, petitioner's defense—in which she presented no evidence (652 F.2d at 742)—was one of complete innocence, based on her position that she had no connection to the drugs. Thus, as the court of appeals observed, the jury would conclude from the evidence either that she was innocent or guilty as charged.

Citing the Eighth Circuit's own prior decision in *United States* v. *Brischetto*, 538 F.2d 208 (1976), however, petitioner asserts that the jury was not compelled to infer an intent to distribute from the mere quantity of the drug. But as the court of appeals noted (652 F.2d at 742), the issue of intent to distribute actually was placed in dispute in *Brischetto* by conflicting and contradictory testimony. 538 F.2d at 210. Here, on the other hand, the evidence clearly established that the 5,000 tablets of methaqualone were for distribution, and there was no evidence to justify any other conclusion. See *United States* v. *Busic*, 592 F.2d 13, 24-25 (2d Cir.

1978); *United States* v. *Burgos*, 579 F.2d 747, 750 (2d Cir. 1978); *United States* v. *Silla*, 555 F.2d 703, 706-707 (9th Cir. 1977); cf. *United States* v. *Chapman*, 615 F.2d 1294, 1298-1300 (10th Cir.), cert. denied, 446 U.S. 967 (1980).

Petitioner also argues (Pet. 19-20) that, particularly in light of the government's contention that she was in "constructive" possession of the drugs, the jury could have found that she was guilty of possession of the drugs only by virtue of her ownership of the premises, and that she knew nothing of the actual placing of the drugs there or the plan to distribute them. But as indicated in the trial court's instruction on actual and constructive possession, the jury was required to find, in order to convict on the basis of constructive possession, that petitioner knew about the drugs in her apartment (Tr. 579). See also *United States* v. *Martinez*, 588 F.2d 495, 498 n.3 (5th Cir. 1979). Therefore, either she knew the drugs were there, and must have shared Schleuter's plan to distribute them, or she was completely innocent of any criminal activity. In these circumstances, the trial court did not err in finding that the evidence in this case did not warrant a lesser included offense instruction regarding simple possession. Further review of this issue on the unusual facts of this case therefore is unwarranted.

6. Finally, petitioner claims error (Pet. 21-22) in an instruction to the jury that she claims intimated a shift in the burden of proof from the government to the defendant. The contention is frivolous.

At the end of the court's charge to the jury, the court explained the use of the verdict form and concluded with the following statement (Tr. 583):

> I tell you again that your sole purpose, ladies and gentlemen, is to find upon guilt or innocence. The sentencing is entirely up to the Court.

A moment before, the court had told the jury to write in the words " 'Guilty' or 'Innocent' as the case may be" on the verdict forms (*ibid.*).

The court of appeals was correct in concluding (652 F.2d at 742) that no error occurred in these remarks. It is apparent from the record that the import of the court's statements was simply to explain the proper procedure and to remind the jury that it was to return a verdict without concerning itself with the consequences in terms of punishment. Furthermore, the court twice emphasized in the course of its explanation that it was in no way suggesting what the verdict should be (Tr. 582, 583). There is simply no merit to the argument that the court's remarks in any way suggested to the jury that the presumption of innocence should not be observed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

DECEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359618 739